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George Smollet *Provost of the Burgh of Dumbarton*, James Duncanson and Humphry Collquhonn *Baillies of the said Burgh*; Giles Mitchel *Dean of Guild*, James Nicoll *Treasurer of the said Burgh*; Sir James Smallet, Dongal Campbell of Craignish, John Semple of Dulmoack, James Campbell, Son of William Campbell, late *Baillie of Dumbarton*, James Houal *Merchant*; John Irwine, William Curroch, John Glen, William Wilson, and John Campbell, *Counsellors of the said Burgh*; Archibald Cook *Common Clerk*, Allan Semple *Officer*, and John Campbell *Master of the Works of the said Burgh of Dumbarton*,
APPELLANTS.

William Buntin, David Colquhon, David Weir, Alexander Weir *Merchant*, Robert Lally, William Traquair, William Buntine *younger*; John Buchannan, Rober M^c Allaster, Alexander Weir *Tailor*; Robert Mitchel, John Kennedy, William Lang, Patrick Hutchinson, David Hutchinson, John Colquhon, William Mitchel, James Smith, and Alexander Gardiner, RESPONDENTS.

The APPELLANT'S CASE.

THE Town Council of the Burgh of *Dumbarton*, consists regularly of fifteen Persons, who are annually elected. But if the Treasurer elected happens not to be an ordinary Council or he *Virtute officii* has a Seat in Council and makes the Number Sixteen, which was the Case in the Year from *Michaelmas* 1726, to *Michaelmas* 1727.

By the Constitution of the Burgh, the Counsellors in being at *Michaelmas* annually elect their Successors for the ensuing Year.

Of these in the Year from *Michaelmas* 1726, to *Michaelmas* 1727, one died, so that their Numbers were reduced to fifteen, but by the Usage of the Burgh, before the Council proceeds to a new Election, the Number is filled up by electing a new Counsellor in the Room of the Person deceased, which was done at *Michaelmas* 1727, by electing John Semple a Counsellor in the Room of John Lindsay, deceased.

Before the Council was thus filled up, the Number of Counsellors was fifteen, whereof eight were in the Appellant's Interest, and no more than seven in the Respondent's, including the Treasurer, who for that Year was a supernumerary Counsellor.

As the Respondents, though the Minority, were favoured by the Mob, on Account of some late Transactions in the Neighbourhood of that Place, they form'd a Project of accomplishing by Violence what by no other Means could be effected, and as the Day for the general Election was to be the twenty ninth of *September*, they on the nineteenth of that Month privately, but violently carried off Arch. Porterfield, one of the Electors in the Appellant's Interest, and having hurried him on Board of a Boat, carried him into a distant Island, where by Force they detain'd him 'till the Election was over; one of the Chief in the Project and Execution of this Design was the Respondent David Colquhon.

Their Success in this, however, did not determine the Election, because there still remain'd a Majority against them, but it encouraged them to a further Attempt of the same Nature, for on the 22d of that Month the said David Colquhon, with divers others his Accomplices in the Night-time fell upon John Ewing and John Campbell two more of the Counsellors, with an Intent to carry them also off, to a Boat which they had ready for that Purpose; to facilitate their Design, they beat and bruised them most unmercifully; but some well-disposed Persons luckily coming up with them before the Project was compleatly executed, these two Counsellors were rescu'd out of their Hands, tho' in a very bad Condition by Reason of the severe beating they had met with.

Upon this very extraordinary Usage, and upon just Apprehensions, that if it was not check'd, the Mob headed by this David Colquhon might proceed to farther Outrages, Application was made to one of the Lords of Justiciary in *Scotland*, and a Warrant was obtained for committing the said Colquhon, as was also another Warrant for committing four of the other Riotors his Assistants, who were not Counsellors, and Colquhon on the 28th of *September* was committed accordingly to the Castle of *Dumbarton*.

On the 28th of *September*, John Semple was chosen a Counsellor, in the Room of John Lindsay deceased, according to the Usage of the Burgh: And on the 29th, the regular Day for the annual Election, the Magistrates and Town Council were summoned to the Council-House, in order to the Election. Eight Counsellors, who is a full *Quorum*, accordingly assembled: But the Counsellors in the Respondents Interest, being only six in Number, and who with the Addition of Colquhon could have been no more than seven, separated from them, retired to a Tavern, and there made a pretended Election of the Respondents. At the same Time the Provost, and the other Counsellors, who were a full *Quorum*, proceeded in the Town House to a regular Election of the Appellants as Magistrates and Town Counsellors, who took Possession of the Government of the Burgh accordingly.

The Respondents nevertheless were not discouraged by this ill Success in their violent Projects. But on Pretence that George Smollet the Appellant was not qualify'd to be elected Provost,

Provost, because of certain obsolete Statutes, and that the committing the said *Colquhoun*, one of the Counsellors in the Respondent's Interest, to the Castle of *Dumbarton*, and not to the Town Goal, was an illegal Act intended to deprive him of his Right of Voting without just Cause, brought their Action of Reduction and Declarator, before the Court of Session in Scotland, for setting aside the Appellants Election, and for declaring the Respondents to have been duly elected.

Jan. 24. 1728-9. As a great many groundless and frivolous Allegations were made by the Respondents, to which Answers were offered by the Appellants, at hearing the Cause, the Lord Ordinary on the 24th Day of January 1727-8, before Answer, allowed the Respondents to prove the several Facts and Circumstances libelled, and allowed the Appellants to prove the Facts alleged in Defence; and that both *prout de jure*.

That several Witnesses being examined on both Sides, and Publication passed, the said Cause came to be heard before the said Lords on the 6th Day of February, 1728-9. And then the Respondents thought fit to insist, as a Ground, for setting aside the Election *in totum*.

That the Appellant *George Smollet* was no Trafficking Merchant, nor Residenter in the Town of *Dumbarton*, and therefore could not, because of the Acts of the 4th Parliament of King James the 5th, Chap. 26. and the Act of the 8th Parliament of King James the 6th, Chap. 20. which disables all Persons, not being actual Traders and Residenters within the Burgh, to be elected Provost, Baillies, or Aldermen: But if he was capable to be elected, he ought not to continue above one or two Years; whereas he had been Provost since 1715.

To which it was answered, That by the Settlement or Constitution of the Town, the Burgh is said to be made up of Merchants and Tradesmen. And the constant Practise of that Burgh was proved to be, That every Person who was not of any of the Trades or Companies of Mechanicks, was capable of being elected a Magistrate. And that tho' the Appellant *Smollet* did not trade, yet he was a considerable Proprietor in the Town, and resided there for some Time of the Year, and was greatly interested in promoting the Advantage of the Burgh, and therefore proper to be intrusted with the Magistracy thereof; and whatever the Directions of the Statutes made so long ago as the Reign of King James the 5th and 6th may have been, these are intirely disused, and by the constant Construction of the Law of Scotland, a Statute by a contrary Usage, for Time past Memory loses its Vigor.

Feb. 6. 1728-9. But the Lords found the Reason of Reduction (to wit) That the Appellant *George Smollet*, was not a Merchant residing in the Town of *Dumbarton*, relevant and proved, and therefore reduced his Election as Provost.

That the said Cause being again heard on the 8th of the same Month, it was then insisted upon for the Respondents; That the Election ought to be reduced *in totum*, because it was carried on without a sufficient *Quorum*; and that the Want of a *Quorum* was occasioned by the detaining of the Respondent *David Colquhoun*, one of the Counsellors, in the Castle of *Dumbarton*, during the Time of the Election, by the Procurement of the Appellants.

It was answered for the Appellants, That the Respondent *Colquhoun* was legally imprisoned by the Authority of a Judge, That if such Imprisonment had been irregular, it did not appear the Appellants were to be blamed, not being Accessary to it. That supposing he had been at Liberty, and had voted for the Respondents, the Appellants had an undoubted Majority for those who separated themselves, and pretended to vote for the Respondents, were but six; whereas the Electors who voted for the Appellants were eight, which is a *Quorum* of the Council. That the Appellants were regularly chose by an undoubted Majority, and therefore no Reason to avoid this Election. But,

Feb. 8. 1728-9. The Lords found that the Execution of the Warrant against *David Colquhoun* upon an Information exhibited against him of an atrocious Crime by incarcerating him in the Castle of *Dumbarton*, was a Contrivance of Design to disable him from being present at the ensuing Election. And they found it proved that Provost *George Smollet*, and these adhering to him were accessary to the said Contrivance and Execution which they found relevant to annul the Election of the said Provost *Geo. Smollet*, and the other Appellants, the Magistrates and Council joining with him. And likewise they found it proved, that *Arch. Porterfeild* was violently seiz'd and carried away to an Island of *Lochblomond*, which they found was done by a Contrivance designed to disable him to attend at the said Election, and that *William Buntine* and others joining with him were accessary to that Contrivance which they found relevant to annul the Election of the said *William Buntine*, and the other Magistrates joining with him, and therefore reduced both the said Elections *in totum*.

Feb. 27. 1728-9. Against so much of the said Interloquitories as avoided the Appellants Election, the Appellants apply'd by Petition: But the Respondents having given in Answers thereto, their Lordships refused the Desire thereof, and affirmed their former Interloquitory.

Against the said Interloquitory of the 6th of February and so much of that of the 8th of February as declares the Election of the Appellants void, and the Affirmance thereof, the Appellants have appealed and humbly hope the same shall be reversed for these Reasons.

Reason I. That tho' the Laws in the Reigns of King James the 5th and 6th, direct that no Person be chosen Provost of a Borough, but Merchants and actual Traffickers within such Borough, yet these Statutes are fallen into Desuetude, and a contrary Custom has prevailed in this and most other Burghs in Scotland.

That Acts of Parliament by the Construction of the Law of Scotland may by falling into Disuse loose their Force is certain. And upon this Foundation divers other Regulations by Statute touching the Government of Royal Burghs, are abrogated by Custom, without any formal Repeal.

II. The securing the Respondent *Colquhoun* in the Castle of *Dumbarton* can afford no Foundation for setting aside the Election of the Appellants, as it cannot be supposed to have been done with a View to disable him from voting. For,

It

It is certain that the Appellants had an undoubted Majority of the Electors having Nine to Seven, including the said supernumerary Vote, and tho' the Respondents by Contrivance carried off Mr. *Porterfeild* to avoid his being present at the Election, (as the Judges have found) yet the Appellants had a Majority of Eight to Seven, so were under no Necessity to take any undue Method to prevent the Respondent *Colquhoun* from voting.

That tho' Mr. *Porterfeild* was carried off by Violence on the 19th of *September* by the Direction and with the Privity of the Respondents, yet the Appellants did not attempt to use any Reprisal: But when on the 22d of the same Month two other of the Electors were insulted and violently beat, with an Intention to carry them off likewise, when these two Electors had made a proper Complaint to the Justices of Peace, and signed an Information against the Respondent *Colquhoun*, it was high Time to apply for a Warrant against him when it appear'd he had been Party to these Facts, and had spirited up the Mob, and that Warrant was duly executed.

Objection I. The Warrant to seize the Respondent *Colquhoun* was brought to *Dumbarton* the 26th of *September*, and yet it was not executed till the 28th, which was done purposely to avoid his being present at the Election which was the 29th.

Answer I. Tho' the Warrant did come the 26th, it was not proper immediately to put it in Execution, if it had, the others concern'd in the Riots would have concealed themselves, or made their Escape. And therefore Application was made to some of the Justices of Peace who met the 27th, and by their Warrant some of the Rioters were that Night taken, and the next Day the Respondent *Colquhoun* was imprisoned.

Objection II. If it was necessary to imprison the Respondent *Colquhoun* it ought to have been in the Prison of *Dumbarton*, which is the County Jail, and not in the Castle.

Answer. The Warrant was to imprison him in the next safe Prison, but the County Jail could not at that Time be judged safe, one of the Keepers being dead, and the other in the Interest of the Respondents, and it could not be advisable for any Person who studied the Quiet of the Burgh, to put the Respondent *Colquhoun*, who had very much spirited up the Mob, under the Custody of one of his own Friends, this would have given new Spirits to the Rioters, rather than incline them to keep the Peace; and the Respondent had the same Right to apply to the proper Judges for being bail'd out of the Castle, as he could if he had been in the Prison of *Dumbarton*.

Reason III. Supposing this Imprisonment of *Colquhoun* to have been unjust, yet as none of the Appellants (the Provost excepted) had any Share or Concern in this, it is apprehended this unjust detaining can't avoid the Election of the other Appellants, by whose Concurrence or Advice it is not so much as pretended any thing of this Nature was transacted, especially since it is obvious that had the Respondent *Colquhoun* been at Liberty, and voted for the Respondents, yet the Appellants had an undoubted Majority.

If this should prevail it would be in the Power of any Faction in a Town when they can't carry an Election, at least to avoid the Election of the others. For if the Minority should raise Mobs and Riots, and in order to prevent the Increase thereof some of the Ringleaders are imprisoned, if that be construed sufficient to avoid an Election, it will be easy for any Minority, if not to set up themselves, yet to pull down the adverse Party, and dissolve the Government of the Corporation.

Since then the Provosts Qualification is supported by the general Usage of this Burgh, as well as of most other Burghs in Scotland. Since the Respondents made the first Attempt, and carried off one of the Electors; since what was done with Relation to Collquhoun was in Pursuance of a legal Warrant; since the Appellants had an undoubted Majority, tho' Collquhoun had been present; there seems no Reason to avoid the Election of the Appellants: And therefore the Appellants humbly hope the said Interloquitories, so far as they set aside the Election of the Appellants, shall be reversed, or that your Lordships will make such other Order as shall seem just.

DUN. FORBES.

C. TALBOT.

WILL. HAMILTON.

George Smollet, Esq; and others,
APPELLANTS.

William Buntine, and others, RE-
SPONDENTS.

The APPELLANT'S CASE.

To be heard at the Bar of the House of Lords,
on Monday the 9th Day of February, 1729-30.



